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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RAYON BURNS SIMMONS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it cruel and unusual punishment under the Eighth Amendment to enhance a defendant's sentence under Section 2D1.1(b)(1) of the United States Sentencing Guidelines for possession of a firearm during a drug trafficking offense when there is insufficient evidence of a temporal and spatial relation between the weapon, the drug trafficking activity and the defendant.

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OPINION BELOW

The text of the opinion of the Court of Appeals for the Eighth Circuit is unpublished, but is reported in a table as United States v. Rayon Burns Petitioner, 89 F.2d 842 (8th Cir. 1996). The text of the opinion is available electronically as United States v. Rayon Burns Petitioner, 1996 WL 315764 (8th Cir. (Mo.)), and appears in Appendix A to this Petition.

STATEMENT OF JURISDICTION

On June 12, 1996, the United States Court of Appeals for the Eighth Circuit issued the opinion denying Petitioner's appeal. No Petition for Rehearing was filed. Petitioner seeks review of the decision of the Eighth Circuit under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution states, in pertinent part: "nor cruel and unusual punishment [be] inflicted." Const. Amend. 8.

Section 2D1.1(b)(1) of the United States Sentencing Guidelines states: "If a dangerous weapon (including a firearm) was possessed [during a drug trafficking crime], increase by 2 levels." U.S.S.G. §2D1.1(b)(1)(1994).

STATEMENT OF THE CASE

The United States District Court, Eastern District of Missouri, Eastern Division had original jurisdiction over this case pursuant to Title 18 U.S.C. §3231 as Petitioner was charged with offenses against the laws of the United States.

On December 15, 1994, Petitioner was charged under two counts of a four count Superseding Indictment with conspiracy to possess with the intent to distribute cocaine and distribution of cocaine. Petitioner pled guilty to the charges on April 7, 1995.

At Petitioner's plea he admitted the offense conduct. However, there was no mention at the plea of possession of a firearm during either transaction. Likewise, the Stipulation of Facts Relative to Sentencing, signed by all parties, does not mention Petitioner's possession of a gun during

the commission of either crime. Petitioner was never charged with carrying a firearm in relation to a drug trafficking crime or any other weapons offense.

The Presentence Investigation Report was prepared May 12, 1995. Petitioner filed a Motion to Correct the Presentence Investigation Report and Memorandum of Law in Support Thereof on August 4, 1995. On August 16, 1995, an Addendum to the Report was made. On September 25, 1995, Petitioner raised his objections to the Presentence Investigation Report prior to sentencing.

The Presentence Investigation Report states in paragraph 25 that Petitioner's offense level must be increased two levels pursuant to §2D1.1(b)(1) of the Guidelines, since a firearm was possessed. The Report states that on December 1, 1994, Derke Quarrels entered a residence at 2144 67th Street in St. Louis, and purchased six ounces of cocaine from Petitioner. The Report further states that on December 23, 1994, during the search of Petitioner's residence at 67th Street, a loaded 9 mm revolver was found on the bedroom dresser.

Petitioner filed objections to paragraphs 13 and 25 of the Report claiming the gun found was not involved in the commission of the offense charged or even present at the time of the offense. Petitioner argued that the revolver had no connection to the crime charged, and was legally registered. He claimed the weapon was used by his sister for home protection. Also, he claimed the Quarrels' drug transaction did not take place in the residence.

In the Addendum to the Report, the probation officer took the position that the information contained in the offense conduct section was accurate based on the investigative reports and discussion with the government's counsel. The officer did not change his position, and maintained that an increase of two levels was appropriate because Petitioner' gun was found in the search of the 67th Street residence on December 20, 1994. Although the officer disagreed with Petitioner's objections on this point, he agreed the objections could have an impact on the Guideline calculation.

Prior to sentencing, Petitioner renewed his objections to paragraphs 13 and 25 of the Report. In

support of the two level enhancement, the Government presented Special Agent Dean Duke of the Drug Enforcement Administration. Duke testified he surveilled 2144 67th Street with Officer Joe Delia on December 1, 1994. He said from 9:30 p.m. to 9:50 p.m. there was no activity at the house.

Duke testified that at 9:50 p.m. a van parked in the driveway of the house, and a black male got out and went inside. He said the license check on the van showed the registered owner was Derke Quarrels. He stated that at 9:55 p.m. a black male left the house and drove away in a burgundy Buick Regal. Duke said he recognized that man to be Petitioner.

Duke said the next day he met with other DEA agents who had arrested Quarrels for delivery of cocaine at 10:30 p.m. the previous night. He testified the agents had told him they had interviewed Quarrels about from whom he had obtained the cocaine. Counsel objected to the hearsay nature of Duke's testimony about the agents comments about Quarrels' alleged statements to them. The Court overruled the objection, but stated it could be a

continuing objection. Duke said the agents said Quarrels said that he purchased the cocaine from Petitioner at his 2144 67th Street residence.

Duke testified he executed a search warrant at 2144 67th Street on December 23, 1994. He said he found one loaded Glock 9 mm semi-automatic pistol on top of the night stand in the only bedroom. Duke stated he found a receipt for the purchase of the weapon in Petitioner's name. He said he did not recall seeing any women's clothes in the house.

On cross-examination, Duke admitted he never went in the residence on December 1st. He agreed he had no personal knowledge about what went on in the house that night. Duke admitted it was dark outside, and that he could not see in to the house.

Duke conceded he saw nothing that would indicate Petitioner had a weapon when he left his house that night. He said he did not see Petitioner carrying a gun in his hand. He said he had never seen Petitioner prior to that night. Duke said he did not know if Quarrels was carrying a gun that night.

Duke said he had no personal knowledge as to whether Quarrels followed Petitioner to another location after he left the area. He stated Quarrels was arrested at 10:30 p.m. at about a twenty minute drive from Petitioner' residence. Duke admitted he never heard Quarrels say he bought the cocaine from Petitioner.

Duke said he was not aware of Quarrels telling the agents that he had seen a gun at Petitioner's house. He said Quarrels gave the agents no information about the possible location of a gun in the house. He admitted he had no personal knowledge the gun was in 2144 67th Street on December 1st.

Duke agreed the search warrant was executed twenty-two days after the surveillance. He said he found no drugs or scales during the search. He conceded that the gun found was lawfully registered to Petitioner. He said his understanding was that, in the proffer, Petitioner said the transaction with Quarrels occurred near a "Goody Goody," not at his house. Duke said Quarrels refused to talk with him later.

The Government's only other witness was Officer Joseph Delia, who was assigned to the federal drug task force. He said it would take approximately twenty-five minutes to drive directly from Petitioner' house to Halls Ferry Circle, and then another ten to fifteen minutes to drive on to Goodfellow and Natural Bridge.

Delia said he had participated in interviews with Petitioner. He agreed that Petitioner said he did not do the drug transaction at his house. Delia opined that Petitioner's story was inconsistent with the known time frame.

On cross-examination, Delia admitted he had no evidence to support the claim that the gun was in Petitioner's house on December 1st. On redirect, Delia claimed Norman Davis had told him he knew Quarrels was coming to the house on December 1st to buy cocaine. He also said Davis had told him Petitioner had owned the gun for seven months prior to December.

On re-cross, Delia admitted Davis did not tell him whether the gun was present at 2144 67th Street on December 1, 1994 He also conceded Davis had told

him that he had told Petitioner not to conduct any drug transactions at the house that night because he thought the place was under surveillance. Delia testified Davis did not known where the drug deal had taken place on December 1st.

The defense presented no evidence on the weapon issue. After hearing arguments by both parties, the court denied Petitioner's objections. Then, the court added two levels pursuant to §2D1.1(b)(1) to Petitioner's offense level of 31, for a total offense level of 33. The court reiterated that all of Petitioner' objections concerning the gun were continuing.

The court sentenced Petitioner to be committed to the custody of the Bureau of Prisons for a term of 144 months on each count, with those terms to run concurrently. Petitioner was also sentenced to five years of supervised release, and a total special assessment of $100.00.

REASONS FOR GRANTING WRIT OF CERTIORARI

Writ of certiorari should be granted on this Petition because (1) it presents an important

constitutional issue which has never been addressed by this Court; and (2) it presents this Court with an opportunity to rectify an unjust, cruel and unusual sentence imposed on Petitioner.

The Eighth Circuit found that Petitioner arranged a drug deal at his home, and that the gun was found at the residence a few weeks later. Simmons, 1996 WL 315764. It held this to be a sufficient temporal and spatial relationship. In so doing, it relied on United States v. Britton, 68 F.3d 262, 265 (8th Cir. 1995), cert. denied, 116 S.Ct. 1322 (1996). Id. However, Britton is distinguishable in several significant ways.

First, Britton's pistol was found along with drugs in his office during the search. Id. at 265. Second, Britton admitted that he was a drug dealer and had used the pistol during all his drug transactions for protection of the large sums of money he carried. Id. Here, when Petitioner's house was searched, no drugs or paraphernalia were found. Also, Petitioner never made any admissions that he ever used the gun in question for protection during drug deals or that it was in any way involved

with any drug sales. Because of these distinctions, Britton is not controlling.

The Eighth Circuit has conceded that the length of time between the seizure of a firearm and a charged offense may be relevant in determining whether there is a nexus between the two. United States v. Matthews, 5 F.3d 1161, 1166 (8th Cir. 1993). Further, the Eighth Circuit has found it significant when no additional drugs are discovered at a later seizure date. United States v. Shields, 44 F.3d 673, 674-675 (8th Cir. 1995). Both of these factors weigh in Petitioner's favor because they are true of his case.

Petitioner asserts there was insufficient evidence presented by the Government (1) to show the gun was present when the crimes at issue occurred, and (2) to show it was probable the gun was connected to those crimes. There was no evidence presented that Petitioner possessed the gun during the time he participated in the conspiracy under Count I, or during the time he sold cocaine to Quarrels under Count II. Petitioner concedes there was evidence he owned the gun because it was legally

registered in his name. Likewise, Petitioner agrees there was evidence he constructively possessed the gun because it was found in the bedroom in the apartment where he lived. However, mere presence of a gun is insufficient. United States v. Hammer, 3 F.3d 266, 270-271 (8th Cir. 1993); United States v. Khang, 904 F.2d 1219, 1224 (8th Cir. 1990).

In this case, the Government failed to show that a temporal and spatial relation existed between the weapon, the drug trafficking activity and Petitioner. United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). Generally, the Government must provide evidence that the gun was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred. Id. There was no evidence to show it was probable the gun was connected to the crimes to which Petitioner pled.

The gun was found in Petitioner's residence in the bedroom on a night stand pursuant to a search warrant on December 23, 1994. This was twenty-two days after the last known drug activity with Quarrels. The time period of the conspiracy alleged

in the Indictment ended on December 15, 1994, when it was filed. Therefore, there was no temporal relationship between Petitioner, the gun and any drug activity. Hooten, 942 F.2d at 882.

At the time of the search, no large amount of cash, no drugs and no paraphernalia were found in Petitioner' home. This distinguishes Petitioner's case from all others where a weapon is found in the same place as drugs, paraphernalia, or quantities of money. See United States v. Richmond, 37 F.3d 418, 420 (8th Cir. 1994) (gun and cocaine found in same one bedroom apartment from which defendant sold drugs); United States v. Hayes, 15 F.3d 125, 127 (8th Cir. 1994) (weapons found in storage locker with drug paraphernalia used to prepare drugs for distribution); United States v. McMurray, 34 F.3d 1405, 1415-1416 (8th Cir. 1994) (gun found in luggage with paraphernalia with cocaine residue during conspiracy time period); United States v. Cotton, 22 F.3d 182, 185 (8th Cir. 1994) (gun found in room with crack cocaine, cellular phone and cash). Likewise, there was no evidence anyone ever saw Petitioner with a gun during the offenses to

which he pled guilty. See United States v. Montgomery, 14 F.3d 1189, 1198-1200 (7th Cir. 1994) (no evidence indicating possession of firearm during drug sales). Therefore, there was no spatial relationship between Petitioner, the gun, and any drug activity. Hooten, 942 F.2d at 882.

In United States v. Matthews, 5 F.3d 1161 (8th Cir. 1993), the Eighth Circuit found that the district court was clearly erroneous for enhancing the defendant's sentence two levels under §2D1.1(b)(1) because the gun was seized during a search conducted more than a year after the end of the drug distribution activity. Id. at 1165-1166. In United States v. Bost, 968 F.2d 729 (8th Cir. 1992), the Eighth Circuit reversed a finding by the district court enhancing the defendant's offense level under §2D1.1(b)(1) by two levels because the guns were discovered in a search two and one-half months after the last overt act in the conspiracy. Id. at 731-733. Likewise, in United States v. Shields, 44 F.3d 633 (8th Cir. 1995), the Eighth Circuit found an enhancement of defendant's sentence under §2D1.1(b)(1) was clearly erroneous because the

seizure of the firearms involved occurred thirty-seven days after the last known drug transaction. Id. at 674-675. Petitioner asserts his case is factually identical to these cases, except the time between offense conduct and discovery of the gun is twenty-two days.

There was no evidence presented at the sentencing hearing which would indicate the gun was present during any illegal activity. Id. at 674; Khang, 904 F.2d at 1223-1224. The Government presented no testimony to attempt to connect the gun to Count I. Therefore, it failed to meet its burden of proof. Shields, 44 F.2d at 674. There was no evidence that drugs were being shipped to, processed in, or sold from Petitioner's residence where the gun was found. In fact, there was no evidence the gun was in the house on December 1, 1994, in relation to Count II. Therefore, the Government again failed to meet its burden of proof. Id.

The only evidence presented at the sentencing hearing by the Government was the testimony of Agent Duke and Officer Delia. Duke admitted he had no personal knowledge about the presence of weapons

during any of Petitioner's offense conduct. Duke's knowledge about the December 1, 1994, transaction between Quarrels and Petitioner came from what other agents told him Quarrels had told them.

Duke testified the agents said that Quarrels told them that he bought cocaine from Petitioner at 2144 67th Street on December 1st. However, he admitted Quarrels had not mentioned seeing a gun that night at Petitioner's house. Duke said Quarrels refused to talk to him later. He acknowledged that Petitioner had said the deal with Quarrels did not take place at his house.

Officer Delia admitted he had no evidence to support the claim that the gun was in Petitioner's house on December 1st. Delia conceded Petitioner's uncle he had told him that he told Petitioner not to sell drugs at the house that night because he thought it was being watched. He also admitted Petitioner's uncle said he did not know where the drug deal took place on December 1st. Delia testified that, in interviews with Petitioner, he said the drug deal with Quarrels had not been done in his house.

It is well settled in the Eighth Circuit that the right to confrontation does not attach to a sentencing hearing. United States v. Wise, 976 F.2d 393, 401 (8th Cir. 1992). Yet, there are limitations on the use of hearsay evidence at such proceedings. Id. at 402. Uncorroborated hearsay evidence may be considered by the court, so long as it has "sufficient indicia of reliability to support its probable accuracy." Id. at 403.

Here, the only testimony that a drug sale ever occurred at Petitioner's residence, where the gun was found twenty-two days later, was from hearsay upon hearsay of Quarrels to the agents to Duke. There was no corroboration of Quarrels double hearsay statement. He refused to talk directly with Duke. Quarrels refused to testify at the sentencing hearing.

Other hearsay testimony conflicted with Quarrels alleged statement that he bought the cocaine from Petitioner at his house. Both Duke and Delia agreed Petitioner said the transaction did not happen at the 67th Street house. Delia said Petitioner's uncle said he warned Petitioner not to

do a drug deal at the house. The location of Quarrels arrest was not near Petitioner's house, consistent with Petitioner's description of the sale.

Duke's uncorroborated double hearsay statement that drugs were sold by Petitioner to Quarrels at the 67th Street house on December 1st was not sufficiently reliable to be admitted. See United States v. Cammisano, 917 F.2d 1057, 1061-1062 (8th Cir. 1990) (unreliable evidence was merely hearsay upon hearsay upon hearsay). The Eighth Circuit should have found counsel's objection to this testimony was proper. Not even the most tenuous of connections was made between the drug deal and Petitioner's residence. Furthermore, no connection was made between the gun and the Quarrels' drug sale.

If this Court feels it is necessary, it may remand to the district court for entry of written findings and determinations on these issues as required by Rule 32(c)(1). Fed. Rules Cr.Proc., Rule 32, 18 U.S.C.A.; United States v. Moore, 977 F.2d 1227 (8th Cir. 1992); United States v. Coleman, 990

F.2d 419 (8th Cir. 1993). No written findings were attached to the Judgment and Commitment. However, if this Court finds the court below made sufficient findings on the record at the sentencing hearing, remand may be unnecessary to rule on the underlying issue. See United States v. Montoya, 891 F.2d 1273 (7th Cir. 1989); but see United States v. Villasenor, 977 F.2d 331 (7th Cir. 1992).

It was fundamentally unfair for the Eighth Circuit to overlook the established case law when considering the facts of this case. Further, it resulted in cruel and unusual punishment to Petitioner because his range of punishment would have been 108 to 135 months at level 31 with a criminal history category of I, rather than 135 to 168 month at level 33 with the same criminal history category. Petitioner's sentence of 144 months would have been at least 11 months shorter. To improperly enhance his sentence this way constitutes cruel and unusual punishment.

CONCLUSION

For the reasons set forth above, Petitioner respectfully request this Honorable Court issue a

Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review its judgment and opinion in this case.

Dated: September 10, 1996.

Respectfully submitted,

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Appendix A

United States Court of Appeals for the Eight Circuit

No. 95-3469

United States of America, Appellee,
v.
Rayon Burns Simmons, also known as Rayon Alton, also known as Rayon Burns, also known as Rayon Parker, Appellant.

Submitted June 6, 1996.

Decided June 12, 1996.

Before BEAM, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Rayon Burns Simmons pleaded guilty to conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§841(a)(1) and 846, and possession of cocaine with intent to distribute, in violation of section 841(a)(1). At his sentencing hearing, the government presented evidence that Simmons was using his residence to further the conspiracy; that Simmons distributed cocaine on December 1, 1994; and that on December 23, 1994, officers recovered a loaded 9mm Glock revolver while searching Simmon's residence. Based on this evidence, the district court [FN1] assessed a firearm-possession enhancement under U.S.S.G. §2D1.1(b)(1), and imposed concurrent sentences of 144 months imprisonment followed by five years supervised release. Simmons appeals, challenging the enhancement. We affirm.

FN1. The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

For the section 2D1.1(b)(1) enhancement to apply, "the government has to prove by a preponderance of the evidence that it is not clearly improbable that the weapon had a nexus with the criminal activity." United States v. Richmond, 37 F.3d 418, 419 (8th Cir. 1994), cert. denied, 115 S.Ct. 1163 (1995); U.S.S.G. §2D1.1, comment. (n. 3). "The government can prove that the weapon was connected with the offense by showing that 'a temporal and spacial relation existed between the weapon, the drug trafficking activity, and the defendant.'" United States v. Payne, 81 F.3d 759, 763 (8th Cir.1996)(quoting United States v. Bost, 968 F.2d 729, 732 (8th Cir. 1992)).

Here, the government presented evidence that Simmons arranged (if not consummated) a drug deal at his residence during the course of the conspiracy, and that the gun was found at the residence a few weeks later. We conclude that the district court did not clearly err in accepting this evidence as true, and we are of the view that it established the required temporal and spacial relationship. See Payne, 81 F.3d at 763 (in context of conspiracy, government can prove nexus by showing gun was found "where part of the conspiracy took place"); cf. United States v. Britton, 68 F.3d 262, 265 (8th Cir. 1995) (affirming § 2D1.1(b)(1) enhancement where firearm was found eight months after drug sale), cert. denied, 116 S.Ct. 1322 (1996). We see no abuse of discretion in the district court's admission of hearsay testimony at

sentencing. See United States v. Cassidy, 6 F.3d 554, 557 (8th Cir.1993). But even without that testimony, we think that the evidence supporting the enhancement was sufficient.

Accordingly, the judgment was affirmed.

A true copy.

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